BAIL SLIP

That the appellant/accused viz., Moorthy in Crl.A.No.1187/2000 on the file of the High Court, Madras was enlarged on bail as per order of this Court dated 18.12.2000 and made in Crl.MP.No.9466/2000 in Crl.A.No.1187/2000.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:8.09.2006

CORAM

THE HONOURABLE MR.JUSTICE S.ASHOK KUMAR

CRL.A.No.1187 of 2000

Moorthy ... Appellant/Accused

Versus

State by
Inspector of Police,
Chithode Police Station,
Chithode,
Erode District. ... Respondent/Complainant

For Appellant : Mr.V.K.Muthusamy for
Mr.D.Selvaraju

For Respondent : Mr.N.Kumanan,
Govt.Advocate (Crl.Side).

This Criminal Appeal filed under Section 374(2) Cr.P.C. against the judgment and conviction dated 6.12.2000 made in S.C.No.179 of 2000 on the file of the Principal Sessions Judge, Erode.

JUDGEMENT

Aggrieved over the conviction for the offence under Section 326 I.P.C. passed in S.C.179 of 2000 dated 6.12.2000 by the Principal Sessions Judge, Erode and the sentence imposed against the accused to undergo three years rigorous imprisonment this appeal has been preferred.

2.Brief facts of the case are as follows:

The deceased is brother's wife of the accused. P.W.1 and P.W.3 are sister and mother of the deceased. P.W.2 is a resident opposite side of the house of the accused. One Palanisamy is husband of the deceased Rajamani. The accused is brother of said Palanisamy. The accused had two brothers. The mother of the accused Pappayammal

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settled her immovable property in favour of the accused and another son by name Venkatesan ignoring the rights of Palanisamy and no right was given to Palanisamy. Regarding the same there was frequent quarrel between the accused and the complainant.

3.On 10.10.1999 at about 5 p.m. Quarrel arose between the victim and her mother-in-law. The mother of the accused used filthy language with the victim and on hearing the words, the accused took brick and assaulted on the stomach of the complainant. P.W.1 with the help of others took the injured to the Erode Government Hospital, where first aid was given to the complainant and on the advice of the Doctor the injured was taken to the Government Hospital, Erode on 10.10.1999 itself.

4.On 11.10.1999 at about 1.25 P.M., P.W.5, the Doctor, who was on duty as Civil assistant Surgeon, Government Hospital, Erode examined the victim Rajamani and came to know that the victim Rajamani had been actually brought to the hospital even on 10.10.1999 at about 6.00 p.m. for treatment. But treatment was not given as the victim was not willing for treatment. No entry was made in the accident register on 10.10.1999.

5.P.W.5 examined the injured and found that the victim sustained injury over the abdomen by stone hit by her brother-in-law. P.W.5,Doctor gave treatment to the victim. He sent Ex.P4 intimation to the Police station. Ex.P3 is the accident register. Ex.B5 is the case sheet. The injured was admitted and her name took place in the dangerous patient list. On 12.10.1999 at about 8.00 a.m., P.W.8 who was incharge of the Chithode Police Station received information about the admission of the injured by wireless and proceeded to the out-post police station and received the information Ex.P4. and then he examined the injured and recorded her statement. Ex.P9 is the complaint given by the injured. P.W.8 returned to the police station on the same day and registered a case in Crime No.535 of 1999 under Section 294(b), 323 and 506(2) IPC against the accused. He prepared Ex.P10 F.I.R. He sent the F.I.R. to the Judicial Magistrate No.3, Erode at 10.30 a.m. and then he went to the place of occurrence, where he prepared Ex.P11 observation mahazar and Ex.P1 sketch in the presence of P.W.4. He also seized M.O.1 series, two bricks, under cover of Ex.P2 mahazar. On 13.10.1999 at about 6.00 a.m. P.W.8 arrested the accused at the junction of four roads, Chithode and remanded him to judicial custody.

6.On 11.12.1999 at about 4.30 p.m. the injured, inspite of treatment in the Government Hospital, Erode died. P.W.6, who was on duty at that time sent Ex.P6 death intimation to Out-post Police Station. P.W.9 who was incharge of chithode police station as Inspector of Police received the intimation and altered the F.I.R. to the offence under Section 302 I.P.C. and prepared Ex.P.12 altered

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F.I.R. and sent the same to the Judicial Magistrate, No.3, Erode. He also inspected the scene of occurrence and verified the investigation of P.W.8. On 12.12.1999 between 4.00 a.m. to 7.a.m. he conducted inquest on the body of the deceased in the presence of panchayatdars. Ex.P13 is the inquest report. Along with Ex.P6 requisition he sent the body through constable No.1113 for conducting autopsy.

7.P.W.7 conducted autopsy on the body of the deceased on 12.12.1999 at about 9.30 a.m. and issued Ex.P8 postmortem certificate wherein he noted the following injuries:

> "External injuries:- Nil. Abdomen wound gaping about 6 cm x 1 cm in the mid line, skin depth.
> On internal examination found the following:-
> Heart: 200 gms. Chamber empty.
> Both lungs congested.Rt.250 gms. Left 275 gms.
> Hyoid bone intact.
> On opening the abdomen, paritoneal cavity filled with pus and purulent fluid.
> Spleen congested 90 gms.
> All the intestine are glued together.
> There is a pocket of pus about 100 to 150 ml. In the subdiaphyrameatic space right side.
> Body kidneys: 120 gms. Congested.
> Stomach: empty.
> Uterus: Normal
> C/s.empty.
> Brain: 1000 gms.
> Spinal column intact."

8.According to P.W.7 the deceased would appear to have died of septicmia and that the death would have occurred 16 to 20 hours prior to autopsy.

9.After completion of postmortem, the material objects from the dead body was seized by P.W.9 with special report Ex.P14. M.O.3 jocket and M.O.4 saree were seized under form 95 Ex.P15. P.W.9 examined the constable and recorded his statement. P.W.10 took up further investigation and lodged a charge-sheet against the accused on 16.3.2000.

10.Before the learned Principal Sessions Judge, Erode on behalf of the prosecution P.W.1 to 10 were examined and Exs.P1 to P15 were marked and also M.Os.1 to 3 were also marked. On behalf of the accused no witness was examined and and no document was marked.

11.When the accused was questioned under Section 313 of Cr.P.C. with regard to incriminating circumstances appearing in the evidence

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of the prosecution witnesses, the accused denied the same as false. The accused also stated that the deceased picked up quarrel with his mother and abused her in filthy language and when he intervened the deceased abused him also in filthy language. At that time the husband of the deceased, the elder brother of the accused first beat the accused with a brick and then the accused also took the same brick and beat the deceased.

12.On a consideration of both oral and documentary evidence, the learned Principal Sessions Judge, came to the conclusion that the offence alleged against the accused under Section 302 is not proved and convicted the accused under Section 326 IPC and sentenced him to undergo three years rigorous imprisonment.

13.Aggrieved over the said conviction and sentence, the accused preferred this appeal.

14.Mr.Mthusamy the learned senior counsel appearing for the appellant would contend that the offence said to have committed by the accused would squarely come under Section 325 I.P.C. Brick is not a dangerous weapon and simple hurt was only caused by the accused. Unfortunately the hit by brick throw on the abdomen had caused the death of the deceased and therefore the offence is squarely applied under Section 325 IPC. Considering the occurrence took place in a sudden wordy quarrel and the weapon used by the accused and the injury caused on the accused the offence would fall only under Section 325 I.P.C.

15.Section 320(8) I.P.C. defines "grievous hurt" as any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

16.If "grievous hurt" is caused by means of any instrument for shooting, stabbing or cutting,or any instrument which used as a weapon of offence, likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood or by means of any animal, and such hurt is said to be a grievous hurt punishable under Section 324 I.P.C. Grievous hurt caused by weapons which are not dangerous as defined above is an offence punishable under Section 325 I.P.C.

17.The brick does not find a place in any one of them as defined above. Therefore brick is not dangerous weapon. It is admitted fact that the injured was in hospital for more than 20 days. While the doctor insisted operation for the treatment the deceased did not give consent for the operation and hence the operation was postponed and therefore the injured herself is responsible for her death.

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18.The learned counsel for the appellant submitted a judgment dealing with similar facts of the case in Lingam v. State rep. by Public Prosecutor reported in 1996 (2) MWNA(Cr.)346., wherein the learned Judge has held as follows:

> "16.In my earlier discussion, I have concluded that the prosecution has clearly established that the appellant merely threw with the stone that hit on the head of the deceased and that hit has resulted in his death. But the question is as to whether the accused had the knowledge that his act would cause injury which likely to cause death.
>
> It it not in dispute that at the time of occurrence there was a scuffle between the victim deceased and the accused and that the deceased fell down and the appellant took a small piece of brick as referred to in the evidence of P.W.1 and threw it on the deceased.
>
> 17.Mr.K.N.Thambi, learned counsel for the appellant brought to my notice a judgment reported in 1985 Crl. L.J. NOC (Kant.) (Division Bench) in the case of State of Karnataka v. Bhimappa and others, wherein it was held on the similar facts that in a quarrel between two parties and both parties started pelting stones and the stones pelted by accused hitting victim resulted in death, it was held the accused can be convicted under Section 325 I.P.C. That was a case where, there was a quarrel going on at the time of the incident in which persons from both sides started pelting stones at each other and, in that melee, persons from both sides sustained injuries. At that time, two accused A2 and A-13 who were on the side of the accused persons, in a spur of moment, also pelted stones without knowing its consequences, which hit the deceased and caused grievous injuries resulting in death. In the light of the above facts, the Division Bench of Karnataka High Court held that merely because A2 and A13 hit the deceased at that moment, it cannot be said that they had intention of causing the death of the deceased or they had knowledge that the injuries sustained by the deceased were likely to cause his death. Thus the accused A2 and A13 were found guilty for offence under Section 325 I.P.C.

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19.In yet another decision rendered by a Division Bench of this Court in Jayapal v. State (C.A.No.884 of 1983 judgment dated 23.7.1987). while dealing with the similar facts of the case, held as follows:

> "It is also not in dispute that the accused threw it on the deceased without aiming at any part of the body. The measurement of the stone as referred to in Ex.P5 Athatchi would show that it was a very small stone. So from the evidence on record, as discussed earlier, it is impossible to hold that a small piece of brick stone used by the appellant was a weapon from which a knowledge could be attributed to him that the hit by such stone would cause death. The fact that the appellant and the deceased were brothers cannot be overlooked. It is also available in the evidence that on the fateful day, there was a wordy quarrel between them at 3.00 p.m. As well as at 5.30 p.m. Not only that when they came to the road side, a wordy quarrel has developed into a scuffle in front of Jambulingam's house. Therefore, taking all these factors into consideration, I am not able to come to a conclusion that the offence committed by the accused would be one under Section 304 Part-II I.P.C. Looking at a small brick used by the appellant and looking into the fact that wordy quarrel and scuffle was going on between these brothers, it could be safely held that the appellant could be attributed only with the intention to cause a grievous hurt to the deceased. Unfortunately, the hit by stone throw on the head had resulted in death. It is also relevant to note that the witnesses P.Ws.2, 3 and 4 nowhere stated that throwing of a stone was made with any force the court found the accused guilty only under Section 325 I.P.C. The observation made in the judgment is as follows:
>
> "The next question that arises for our consideration is what is the nature of the offence that the appellant-accused has committed. It was an unexpected quarrel which unfortunately had resulted in the death of the deceased. Firstly he beat the deceased only with his hand and only thereafter he took a stone which was lying nearby and gave a hit with it on the chest of the deceased. Hence, it is clear that he would not have intended to cause the

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death of the deceased nor such an injury as was likely to cause his death. Therefore, we hold that the facts and circumstances would indicate that the accused would have caused the injury and accordingly the offence would be one punishable under Section 325 I.P.C."

19.So I am in entire agreement with the observation made by the Division Bench of this court as mentioned above. In this case, in a sudden quarrel which took place while deceased and the appellant were along the road and at the spur of the moment, when there was a scuffle, the appellant took a stone and threw it on the body of the deceased which unfortunately, hit on the head. For the foregoing analysis of the evidence and the principles laid down in the above decisions, I am of the view that the appellant could not have had knowledge to cause injury as is likely to cause death. Therefore, I have no hesitation in holding that the facts and circumstances would indicate that the accused would have caused injury with the intention of causing grievous injury. Accordingly, the offence is punishable only under Section 325 I.P.C. As such the conviction imposed upon the appellant under Section 304 Part II I.P.C. is set aside. Instead, he is convicted for offence under Section 325 I.P.C. In view of the above situation, I feel that the ends of justice would be set by imposing a sentence of two years Rigorous Imprisonment for the above offence of Section 325 I.P.C. and in addition to the sentence, a fine of Rs.1,000/-(one thousand) is imposed, in default, to suffer Rigorous Imprisonment for six months. Time for payment of fine is one month from the date of receipt of a copy of this judgment by the trial Court and this amount of Rs.1,000/- collected as fine is to be given to P.W.2, wife of the deceased as compensation. The trial court also after receipt of a copy of this judgment, is directed to intimate the same to P.W.2 to enable her to come to court and receive the same. Regarding two years period, Mr.Thambi, learned counsel for the appellant brings to my notice that there are Government Orders available granting remission for the above period of two years. Learned Government Advocate also does not dispute that fact and he brings to my notice the following Government Orders:

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1.G.O.Ms.No.180 dated 28.1.1989.
2.G.O.Ms.No.781 dated 11.4.1990.
3.G.0.Ms.No.279 dated 23.2.1992.
4.G.O.Ms.No.296 dated 20.2.1993.
5.G.O.Ms.No.205 dated 23.2.1994.

Since these Government Orders are applicable to the appellant, I am of the view that he is entitled to invoke the benevolent provisions of these G.Os. As such, the appellant need not surrender before the Prison Authorities to undergo the un-expired portion of two years sentence which has been imposed for offence under Section 325 I.P.C., since the said period of two years has already been covered by virtue of the above referred G.Os. With these observations, the Criminal Appeal is partly allowed."

20.As far as this case is concerned, the accused is said to have thrown a brick which hurt the abdomen of the deceased. The Accused has neither intention to cause death of the deceased nor had knowledge that such act may cause death. The injured was more than 20 days in the hospital but did not cooperate for the essential treatment viz. operation. Since the injured was in hospital for more than 20 days, the simple hurt has technically become a "grievous hurt" as defined under Section 326 I.P.C. Since the weapon used is not a dangerous weapon as defined under Section 326 I.P.C. the offence committed by the accused is under Section 325 I.P.C.

21.In the above circumstances, I feel ends of justice would be met if the sentence of three years rigorous imprisonment imposed on the accused is modified as one of six months and in addition to the sentence a fine of Rs.5000/-is imposed. From the above period of imprisonment, the period already undergone by the accused shall be set of.

22.With the above modification, the appeal is partly allowed. The said fine amount shall be paid within four weeks from today. Out of the fine amount, Rs.4000/- shall be paid as compensation to the legal heirs of the deceased, either the husband or their children. The learned Principal Sessions Judge, Erode is directed to secure the accused to remand him to undergo remaining period of sentence.

Vk

Sd/-
Asst. Registrar

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Sub Asst.Registrar

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To

1.The Principal Sessions Judge, Erode.
2.The Judicial Magistrate No.III, Erode.
3.-do- thro' The Chief Judicial Magistrate,Erode.
4.The learned Public Prosecutor,High Court, Madras.
5.The Inspector of Police,Chithode Police Station
Erode District.(Crime No.535/99)

+ one cc to Mr.D.Selvaraj,Sr.No.42137.

HRP (CO)
RSM/28.9.2006

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